Supreme Court of the United States

OCTOBER TERM, 1943

46TH STREET THEATRE CORP. and
SELECT OPERATING CO. INC.,
Petitioners-Appellants Below,

against

ROBERT WM. CHRISTIE,
Respondent Below.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the Supreme Court, County of Schenectady, granting judgment to the plaintiff, is not officially reported, but it is found on pages 55 to 58 of the Record. The opinion of the Supreme Court, Appellate Division, Third Department, affirming said judgment, is found on pages 56 to 60 of the Record, and is officially reported in 265 App. Div. 255. The Court of Appeals wrote no opinion, the order of affirmance of the Court of Appeals printed in the Record, and is officially reported in 292 N. Y. 520.

Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

Specification of Errors

(1) The Supreme Court of the State of New York, as well as the Court of Appeals of the State of New York, erred in holding that Section 40-b of the Civil Rights Law of the State of New York was not repugnant to the Fourteenth Amendment of the Constitution of the United States.

(2) The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in granting judgment to the plaintiff.

ARGUMENT

POINT

Section 40-b of the Civil Rights Law of the State of New York is unconstitutional in that it violates petitioners' rights to the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that a corporation is a person within the purview of the Fourteenth Amendment (*Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 396; *Smyth* v. *Ames*, 167 U. S. 466, 522).

The statutory enactment under attack imposes the duty of admitting all persons, other than those who may be offensive or engaged in an activity tending to a breach of the peace, who present tickets of admission to places of public entertainment and amusement under penalty of a $500 fine for violation thereof (Sections 40-b and 41, Civil Rights Law). One of the evils patent in this act is the express limitation of "place of public entertainment and amusement" to "legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Legitimate theatres are included within the operation of the law. Motion picture theatres are excluded. Circuses are included. Fairs are excluded. Music halls are included. Exhibits at art galleries are excluded. Baseball games, common shows, race tracks are excluded. Radio entertainment is excluded. Neither patently or latently is there any basis for the discrimination fastened upon that portion of the entertainment business as defined and limited by the act.

There is no distinction as a matter of law, or as a matter of business, or as a matter of public policy between the legitimate theatre and the motion picture theatre. The legitimate theatre and the motion picture theatre are both privately owned. Each engages in business as a matter of right and not as a matter of sufferance (*Woolcott* v. *Shubert*, 217 N. Y. 212; *Greater N. Y. Athletic Club* v. *Wurster*, 19 Misc. 443). Each is engaged in presenting entertainment for a profit. Each requires a ticket, purchased upon a uniform scale of prices, for admission.

The legitimate theatre entertains its audience by performance upon the stage by living actors. The motion picture entertains its audience by reproductions of living actors upon a screen. The motion picture theatre however does not restrict its entertainment to the showing of motion pictures. Entertainment by living actors in the larger motion picture theatres is the rule rather than the exception. Vaudeville is today substantially confined to presentation at motion picture theatres. Is there to be one rule of conduct while the motion picture is being flashed upon the screen, and another while the stage presentation is in progress? On the other hand, burlesque theatres entertained their audiences during the intervals between the stage presentations by the showing of motion pictures, news reels, comic shorts and the like.

Neither the legitimate theatre nor the motion picture theatre may be operated without the prerequisite license (Administrative Code of the City of New York, Chapter 32). Each is a place of "public amusement" within the purview of the New York City regulations for protection against fire or panic (Administrative Code of the City of New York, Section C19-154.0-C19-170.0) and within the same Code regulations affecting electrical wiring (Section B30-171.0).

The exhibitions at each, irrespective of the fact that one presents its entertainment upon a screen and the other by living actors on the stage must conform to the same prohibition against immorality and indecency (N. Y. Penal Law, Section 1140-a). Each must conform to the same standards with respect to admission and employment of children (N. Y. Penal Law, Sections 484, 485). Neither may discriminate in the price charged for admission (N. Y. Penal Law, Section 515). Neither may exclude any person by reason of race, color, creed or previous condition of

servitude (N. Y. Penal Law, Section 514; N. Y. Civil Rights Law, Section 40).

In mode and method of doing business the motion picture theatre and the legitimate theatre are the same. Prior to the enactment of the statute under attack neither asked nor received any advantage over the other, or any special privileges. The actors in the legitimate play perform essentially the same services as those in a motion picture. A stage version of a play is essentially the same as a motion picture version of that play. Under the act a legitimate theatre would have to admit everyone, whereas a motion picture theatre across the street which might be presenting a motion picture version of the same play then being presented in the legitimate theatre could deny access. The coincidental run of stage and motion picture versions of the same play in similarly located theatres has often occurred in the case of successful plays. The public health, morals and safety are in no way promoted by encouraging people to go to legitimate theatres and discouraging their going to motion picture theatres, or vice versa. Neither may be deemed a necessity in any greater degree than the other.

Whenever persons, engaged in the same business or in business under like circumstances, are subject to different restrictions or are given different privileges under the same conditions there is present an unequal protection of the laws. The said amendment guaranteed that all persons be equally entitled to pursue their happiness and acquire and enjoy property; that no greater burdens be laid upon one than are laid upon others in the same calling and conditions; that no impediments be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances (*Barbier* v. *Connolly*, 113 U. S. 27, 31; *Louisville Gas Co.* v. *Coleman*, 277 U. S.

32, 37; *Bell's Gap R. R. Co.* v. *Penna,* 134 U. S.
Royston Guano Co. v. *Virginia,* 253 U. S. 412, 41

We do not assert that no classification may
But such classification may only be made within
fined limits. It "must be reasonable, not arbit
must rest upon some ground of difference havi
and substatntial relation to the object of the legi
that all persons similarly circumstanced shall b
alike" (*Louisville Gas Co.* v. *Coleman,* 277 U. S
Merchants Refrigerating Co. v. *Taylor,* 275 N. Y.
Atchison Topeka R. R. v. *Mathews,* 174 U. S. 96, it
at page 104:

> "* * * it is also true that the equal protect
> anteed by the Constitution forbids the legi
> select any person, natural or artificial, an
> upon him or it burdens and liabilities whic
> cast upon others similarly situated. Neith
> make a classification of individuals or cor
> which is purely arbitrary, and impose u
> class special burdens and liabilities. Ev
> the selection is not obviously unreasonabl
> bitrary, if the discrimination is based upo
> which have no relation to the object sought
> complished, the same conclusion of uncon
> ality is affirmed."

Thus it was declared in *Colgate* v. *Harvey,* 269

> "The classification in order to avoid t
> tutional prohibition must be founded upon
> and real differences, as distinguished from i
> and artificial ones. * * * Mere differenc
> enough."

Now let us examine the reasons that the Cou
gave for holding the statute under attack not arbi
not without reason. The Trial Justice in his opi

that "While legitimate theatres and moving picture theatres are both places of amusement, still there exists between the two, essential differences, and I am unable to say that the classification adopted by the Legislature is arbitrary, capricious or unreasonable" (fol. 120). It is apparent that the Trial Justice recognized that the legitimate theatre and the motion picture theatre were engaged in the same calling or at least similarly circumstanced. To hold otherwise would require blinding oneself to realities.

But what are the "essential differences" which the Trial Justice held justified the classification? The Trial Justice was content with his conclusion. He enumerated no points of difference. If there exists such "essential differences" why the reticence of the justice in stating them. The silence is ominous. There are no "pertinent and real differences." The death knell to any claim of difference is clearly sounded when one attempts to draw differences between the legitimate theatre and the motion picture theatre which presents living actors on the stage.

In the Courts below respondent urged as a point of difference that "the price range for tickets is much different." The man who pays $3 or $4 must be admitted to the legitimate theatre. The man who pays $.40 or $1 may be excluded from the motion picture theatre. The act penalizes the exclusion of the former, it sanctions the exclusion of the latter. The implication is abhorrent. The rights of liberty, equality and justice guaranteed by the Federal Constitution are put upon the auction block. Constitutional rights are for sale to the man who can pay for a ticket of admission to a legitimate theatre, they are denied to the one who can't "raise the price." Constitutional rights are not to be abridged by such patent and heinous subterfuge.

The sole basis given by the Appellate Division for the classification and exception is "we may take notice that while there are thousands of movie theatres in the state, there are fewer than fifty so-called legitimate theatres * * *. A film that is being shown in a movie house is being shown at the same time in hundreds of others" (265 App. Div. at p. 258). This is not so. "Gone With The Wind" played in New York City for months at the Astor Theatre and could not be seen anywhere else in the city. "Mrs. Miniver" during its record breaking run at the Music Hall in New York City could not be seen at any other movie house in the city. But even though a motion picture may be playing at hundreds of movie houses at the same time that is small comfort to the patron of the local movie house who cannot, either through lack of conveyance or of financial means or a multitude of reasons, go elsewhere to see the movie. The argument by the Appellate Division in effect says that if a patron cannot see a movie in a rural community it is reasonable to tell him to go to New York City.

It is to be noted that baseball games are not covered by the act, thereby permitting the exclusion of persons from the ball park. Manifestly, a person excluded from a ball park cannot see that game elsewhere. Thus, if the only basis for classification is the fact that a theatrical production cannot be viewed elsewhere, the classification is arbitrary and discriminatory when viewed in the light of the baseball park or the rural movie house.

However, the mere fact that there are numerous movie theatres would not prevent discrimination against any particular patron. Motion pictures are shown at chain houses. If the operators of a picture house circuit desire to exclude a particular person, they can, under the act, exclude him from all their houses, and he would be in no better

position than the plaintiff who was excluded from the 46th Street Theatre, or the baseball fan who is excluded from the ball park. If it is reasonable to tell a movie patron to try elsewhere, even though he cannot do so then it is just as reasonable to tell plaintiff to wait until "Panama Hattie" goes on the road and then try elsewhere. By no stretch of the imagination can the number of any amusement type be deemed the "real and substantial differences" required by law (*Bryant* v. *Zimmerman*, 278 U. S. 63), when admission, which is the object of the legislation, may be denied by one as well as by many.

Manifestly the sole object of the statute is to compel a theatre to grant admission to a ticketholder. The statute is not a basis for any tax imposition. It is not concerned with the right to a license. It is not affected by any consideration of health, morals, education or safety of the public. Article 4 of the Civil Rights Law, which embraces Section 40-b, is entitled "Equal Rights in Places of Public Accommodation and Amusement." Section 40-b is entitled "Wrongful refusal of admission to and ejection from places of public entertainment and amusement." The statute be-speaks solely and exclusively "admission."

The classification is arbitrary and capricious in that it has no relation, substantial or otherwise, to the object of the legislation. All persons over twenty-one years of age who present a ticket of admission must be admitted to the legitimate theatre. What possible rationale is there for not imposing a like duty upon the motion picture theatre? Why must the public be permitted to view the presentation at the legitimate theatre, whereas the view of the presentation at the motion picture theatre may be denied?

Admission to places of public entertainment defies classification in the face of the indisputable premise that a mo-

tion picture theatre and a legitimate theatre are equally places of amusement. As stated by Mr. Justice HOLMES in *Buck* v. *Bell*, 274 U. S. 208, the act must bring "within the lines all similarly situated." It is beyond all reason to say that you can draw a line between legitimate theatres and motion picture theatres when the sole object of the act relates to admission to places of public entertainment. The public interest to obtain admission to a motion picture theatre is no less than its interest to obtain admission to a legitimate theatre. There is no reason why admission to one should be more or less onerous than to the other.

In addition to Article 4 of the Civil Rights Law (Section 40) the legislative history of New York overwhelmingly establishes the deep rooted doctrine that legitimate theatres and motion picture theatres both equally fall within the category of places of amusement and are to be treated alike. (*Penal Law*, Sections 484, 485, 514, 515, 517, 711, 1140-a, 2074, 2154; *General Business Law*, Article X-B, Section 168, *et seq.; Town Law*, Section 136[3]; *Village Law*, Section 89[52]; *Administrative Code of the City of New York*, Section C19-154.0).

There is no discernible relation between the classification made by Section 40-b of the Civil Rights Law and the object of compelling admission to places of amusement, nor in fact any basis for the classification at all.

The case of *Western Turf Association* v. *Greenberg*, 204 U. S. 359 (1907), upon which the lower Courts relied for holding the statute constitutional, unmistakably condemns the classification made in the case at bar. It is submitted that said case is in direct conflict with the decision in the case at bar. That case concerned a California statute which made it unlawful to refuse admission to persons over

twenty-one years of age who presented tickets to any opera house, theatre, melodeon, museum, circus caravan, race course, fair, "or other place of public amusement or entertainment." That statute thus expressly included all places of public amusement or entertainment.

The statute present in this case not only did not contain an omnibus clause covering all places of public amusement, but specifically singled out places of amusement to which the act should apply. In the *Western Turf Association* case, defendant urged as a basis of unconstitutionality that the statute denied the equal protection of the laws. The Supreme Court left no doubt about its ruling on that score. It said:

> "The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement and entertainment" (204 U. S. at p. 363).

It cannot be doubted from the language above quoted that the statute would have been stricken down as denying the equal protection of the laws if it had not applied with equal force "to all * * * places of public amusement and entertainment." The most that can be said for the application of the *Western Turf Association* case, in support of respondent's position, is that the statute in that case was held to be a valid exercise of the police power so long as it applied to all places of entertainment. Although a statute may be clearly within the valid exercise of the police power, if it does not accord equal protection then it must be stricken down as violative of the Fourteenth Amendment (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Davis* v. *Massachusetts*, 167 U. S. 43).

Let us proceed further to examine whether there is any necessity for, or evil sought to be corrected by Section 40-b. It is indisputable that there must exist some necessity for the exercise of the police power by the state (*New State Ice Co.* v. *Liebman*, 285 U. S. 262).

In the instant case the record is barren of any necessity for the act. The record establishes the contrary. The uncontradicted proof by persons fully conversant with the subject was that during the past thirty-five years or so there has been but two or three isolated instances of exclusions of ticketholders from theatres (fols. 62-65, 67-70, 78-80, 88-90). Since the turn of the century there have been, to the best of counsel's research, only four reported cases in New York dealing with such a situation. *Collister* v. *Hayman*, 183 N. Y. 250 (1905); *Luxenberg* v. *Keith & Proctor A. Co.*, 64 Misc. 69 (1909); *People ex rel. Burnham* v. *Flynn*, 189 N. Y. 180 (1907); *Woollcott* v. *Shubert*, 217 N. Y. 212 (1916). Each of those cases emphasizes the need of resting control of admission in the theatre operator.

Although there was a complete failure of any showing that any evil or abuse existed with regard to admission, it is not amiss to point out that if it did exist, there is no basis at all for holding that it existed solely with respect to theatres and the other places of amusement as defined and specified by Section 40-b and not with respect to places of amusement excluded from operation of the act. Certainly a law may be directed against an existing evil (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157). But the law may not be directed to any member of a class, unless the danger is characteristic of the member named (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61).

The duty of the State Courts in this case was clear. This Court said in *Mugler* v. *Kansas*, 123 U. S. 623; 8 S. Ct. 273, 297:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

The act is as invidious in its present application as it is in its implications. If the classification in this case is sustained then there would be no limit to classifications in any line of endeavor. This power could be used with devastating force to crush any particular phase of a general class of endeavor and thus completely stifle free trade and competition. The manufacturer of men's suits could be hedged in with restraints whereas his next door neighbor who manufactures men's coats could be left to pursue his way free and untrammelled. The classification here present, and those present by implication, are just as oppressive and odious as if they singled out a particular race or nationality for oppression (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 359; *Gaines* v. *Canada*, 305 U. S. 337).

At no time in our history has the equal protection clause been more sacred than it is today. We have seen the utter degradation and ruin caused by despotic wield of power to oppress minorities. And that is the most vicious form of denying equal protection. Incipient in Section 40-b lurks

the vice of crushing minorities, of singling out special groups or types of business for oppression. We should not relax in resisting legislation so insidious and portentous.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction; and that to such an end a writ of certiorari should issue to the Supreme Court of the State of New York.

MILTON R. WEINBERGER,
Counsel for Petitioners.

WILLIAM KLEIN,
ADOLPH LUND,
Of Counsel.